

GIBSON, DUNN & CRUTCHER LLP
S. ASHLIE BERINGER, SBN 263977
ABeringer@gibsondunn.com
JOSHUA JESSEN, SBN 222831
JJessen@gibsondunn.com
JESSICA S. OU, SBN 280534
JOu@gibsondunn.com
1881 Page Mill Road
Palo Alto, California 94304
Telephone: 650.849.5300
Facsimile: 650.849.5333

Attorneys for Defendant
APPLE INC., A CALIFORNIA CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re iPhone Application Litigation

CASE NO. 11-MD-02250-LHK

CLASS ACTION

**DECLARATION OF MARK BUCKLEY IN
SUPPORT OF APPLE INC.'S MOTION
FOR SUMMARY JUDGMENT**

1 I, Mark Buckley, declare as follows:

2 1. I am the Head of Litigation Finance at Apple Inc. (“Apple”). I have personal
3 knowledge of the facts stated below and could competently testify to them in a court of law. I
4 provide this Declaration to explain certain facts regarding various contractual agreements between
5 Apple and the plaintiffs in this case.

6 **iOS Software License Agreement**

7 2. Attached as Exhibit A is a true and correct copy of the iPhone Software License
8 Agreement (“SLA”) for users of iPhones running iOS version 4. A copy of this SLA or a materially
9 similar version of it has been included inside the packaging of any iPhone that contains iOS 4.1
10 through iOS 4.3.3.

11 3. Attached as Exhibit B is a true and correct copy of the iOS SLA for users of Apple
12 devices running iOS version 5.0. A copy of this iOS SLA has been included inside the packaging of
13 any device that contains iOS 5.0 through 5.0.1.

14 4. Attached as Exhibit C is a true and correct copy of the iOS SLA for users of Apple
15 devices running iOS version 5.1 through 5.1.1. A copy of this iOS SLA has been included inside the
16 packaging of any device that contains iOS 5.1 through 5.1.1.

17 5. As reflected in Exhibits A– C, each version of the SLA for users of Apple devices
18 running iOS versions 4 through 5.1.1 contains the following identical clause in the “Services and
19 Third Party Materials” section:

20 *Certain Services may display, include or make available content, data, information,*
21 *applications or materials from third parties (“Third Party Materials”) or provide links to*
22 *certain third party web sites. By using the Services, you acknowledge and agree that Apple*
23 *is not responsible for examining or evaluating the content, accuracy, completeness,*
24 *timeliness, validity, copyright compliance, legality, decency, quality or any other aspect of*
25 *such Third Party Materials or web sites. Apple, its officers, affiliates and subsidiaries do*
26 *not warrant or endorse and do not assume and will not have any liability or responsibility to*
27 *you or any other person for any third-party Services, Third Party Materials or web sites, or*
28 *for any other materials, products, or services of third parties. Third Party Materials and*
links to other web sites are provided solely as a convenience to you.

6. As reflected in Exhibits A– C, each version of the SLA for users of Apple devices
running iOS versions 4 through 5.1.1 contains the following clause (or a clause that is substantially
similar) in the “Limitation of Liability” section:

TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW, IN NO EVENT SHALL APPLE BE LIABLE FOR PERSONAL INJURY, OR ANY INCIDENTAL, SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS, CORRUPTION OR LOSS OF DATA, FAILURE TO TRANSMIT OR RECEIVE ANY DATA, BUSINESS INTERRUPTION OR ANY OTHER COMMERCIAL DAMAGES OR LOSSES, ARISING OUT OF OR RELATED TO YOUR USE OR INABILITY TO USE THE iOS SOFTWARE AND SERVICES OR ANY THIRD PARTY SOFTWARE OR APPLICATIONS IN CONJUNCTION WITH THE iOS SOFTWARE OR SERVICES, HOWEVER CAUSED, REGARDLESS OF THE THEORY OF LIABILITY (CONTRACT, TORT OR OTHERWISE) AND EVEN IF APPLE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

7. As reflected in Exhibits A– C, each version of the SLA for users of Apple devices running iOS versions 4 through 5.1.1 contains the following clause (or a clause that is substantially similar) in the “Location Data” subsection of the “Consent to Use of Data” section:

Apple and its partners and licensees may provide certain services through your iOS Device that rely upon location information. To provide and improve these services, where available, Apple and its partners and licensees may transmit, collect, maintain, process and use your location data, including the real-time geographic location of your iOS Device, road travel speed information, and location search queries. The location data and queries collected by Apple are collected in a form that does not personally identify you and may be used by Apple and its partners and licensees to provide location-based products and services. By using any location-based services on your iOS Device, you agree and consent to Apple's and its partners' and licensees' transmission, collection, maintenance, processing and use of your location data and queries to provide and improve location-based and road traffic-based products and services. You may withdraw this consent at any time by going to the Location Services setting on your iOS Device and either turning off the global Location Services setting or turning off the individual location settings of each location-aware item on your iOS Device. Disabling these location features will only impact the location-based functionality of your iOS Device. It will not affect iOS Device features unrelated to location services. When using third party applications or services on the iOS Device that use or provide location data, you are subject to and should review such third party's terms and privacy policy on use of location data by such third party applications or services.

(Emphasis in original.)

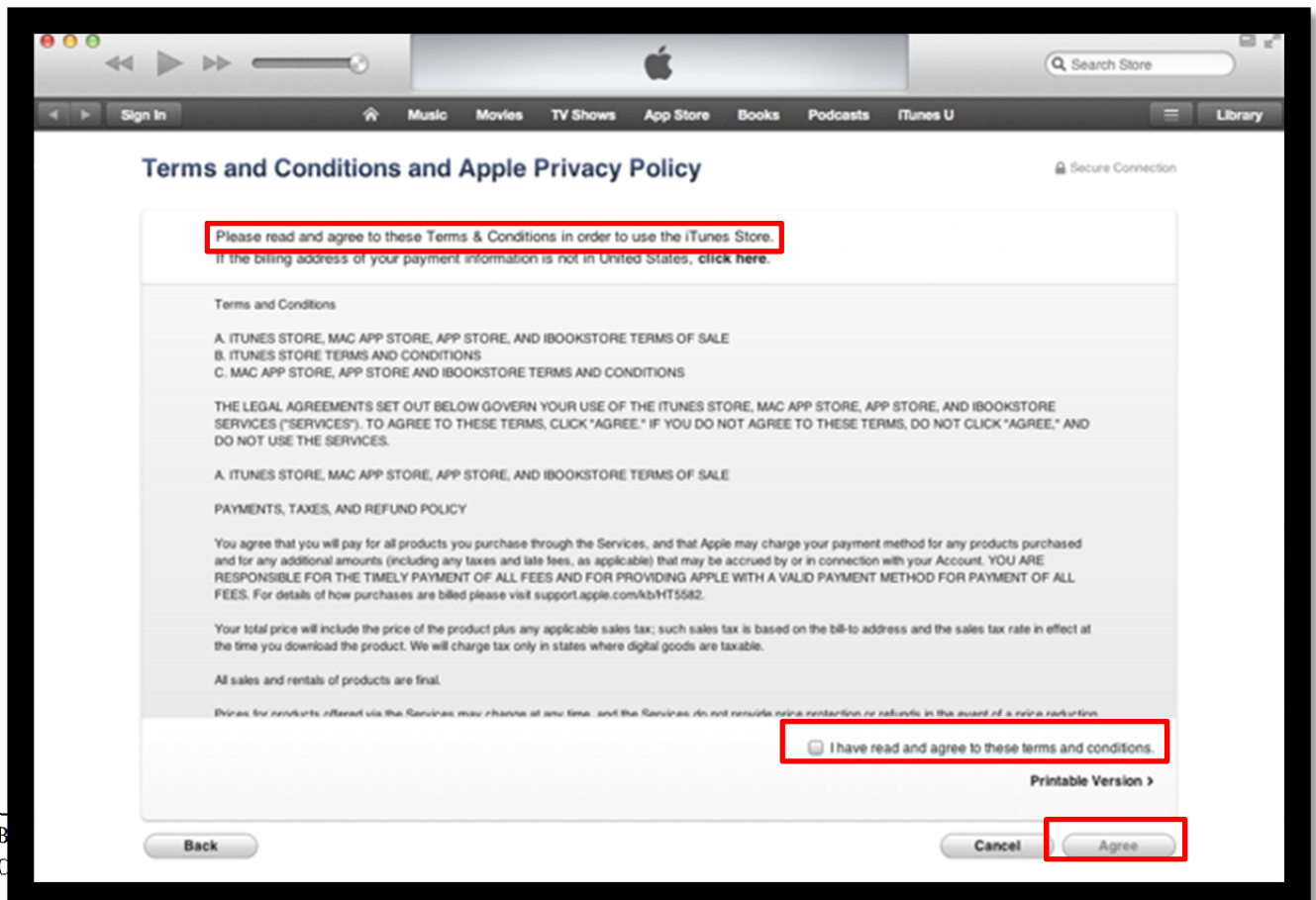
App Store Terms and Conditions

8. Attached as Exhibit D is a true and correct copy of the iTunes Store, Mac App Store, App Store and iBookstore Terms of Sale, iTunes Store Terms and Conditions, Mac App Store, App Store and iBookstore Terms and Conditions, Privacy Policy and Game Center Terms and Conditions

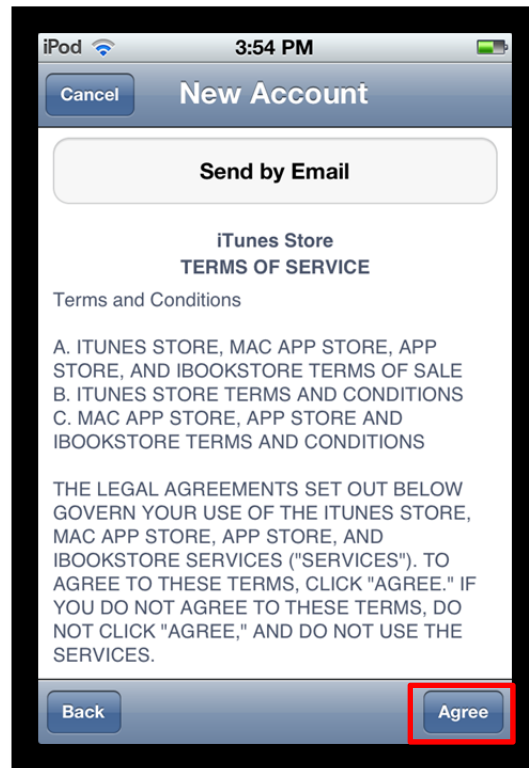
(hereinafter, the “App Store Terms and Conditions”), which was last updated on December 3, 2012.

9. Attached as Exhibit E is a true and correct copy of the App Store Terms and Conditions effective July 9, 2008. Attached as Exhibit F is a true and correct copy of the iTunes Terms and Conditions effective January 6, 2009. Attached as Exhibit G is a true and correct copy of the iTunes Terms and Conditions effective August 9, 2010. Attached as Exhibit H is a true and correct copy of the iTunes Terms and Conditions effective January 6, 2011. Attached as Exhibit I is a true and correct copy of the iTunes Terms and Conditions effective June 6, 2011.

10. Before a user can download any app, free or paid, from the App Store, he or she must first register and create an iTunes account. To create an iTunes account, a user must affirmatively agree to the App Store Terms and Conditions (including the Apple Customer Privacy Policy) by scrolling through the agreement and clicking an onscreen button that is prominently labeled “Agree.” Specifically, any user who registers and creates an iTunes account on a desktop or laptop computer is required to (i) check a box affirming that they have read and agreed to the App Store Terms and Conditions and Apple Privacy Policy; and (ii) click the “Agree” button affirming their agreement to these Terms, as reflected in the screenshot below.



Any user who registers and creates an iTunes account on a mobile device is required to click the “Agree” button to manifest consent to the App Store Terms and Conditions, as reflected in the screen shot below.



Customers manifest their agreement to the App Store Terms and Conditions at the time they register to use the App Store by clicking an onscreen button that is prominently labeled “Agree.”

11. As reflected in Exhibits D – I, each version of the App Store Terms and Conditions that was in effect between July 9, 2008 and the release of iOS 6.0 on September 18, 2012 contains the following clause (or a clause that is substantially similar) in the “No Responsibility for Third-Party Materials or Web sites” section:

You agree that Apple is not responsible for examining or evaluating the content or accuracy and Apple does not warrant and will not have any liability or responsibility for any third-party materials or websites, or for any other materials, products, or services of third parties.

12. As reflected in Exhibits D – I, each version of the App Store Terms and Conditions that was in effect between July 9, 2008 and the release of iOS 6.0 on September 18, 2012 contains the following clause (or a clause that is substantially similar) in the “License of Products” section:

There are two (2) categories of Products offered through the Service, as follows: (i) those Products that have been developed, and are licensed to you, by Apple (the “Apple Products”); and (ii) those Products that have been developed, and are licensed to you, by a third party developer (the “Third Party Products”). The category of any particular Product (i.e., Apple Product or Third Party Product, as the case may be) is identified on the Service application.

13. As reflected in Exhibits D – I, each version of the App Store Terms and Conditions that was in effect between July 9, 2008 and the release of iOS 6.0 on September 18, 2012 contains the following clause (or a clause that is substantially similar) in the “Disclaimer of Warranties; Liability Limitations” section:

IN NO CASE SHALL APPLE, ITS DIRECTORS, OFFICERS, EMPLOYEES, AFFILIATES, AGENTS, CONTRACTORS, OR LICENSORS BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL, OR CONSEQUENTIAL DAMAGES ARISING FROM YOUR USE OF ANY OF THE ITUNES SERVICE OR FOR ANY OTHER CLAIM RELATED IN ANY WAY TO YOUR USE OF THE ITUNES SERVICE, INCLUDING, BUT NOT LIMITED TO, ANY ERRORS OR OMISSIONS IN ANY CONTENT, OR ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF ANY CONTENT (OR PRODUCT) POSTED, TRANSMITTED, OR OTHERWISE MADE AVAILABLE VIA THE ITUNES SERVICE, EVEN IF ADVISED OF THEIR POSSIBILITY.

Apple Customer Privacy Policy

14. Apple’s Customer Privacy Policy (“Privacy Policy”) is incorporated into the App Store Terms and Conditions and iOS Software License Agreements attached as Exhibits A – I.

15. In July 2010, Apple required all users of iTunes or the App Store to affirmatively agree to Apple’s updated Privacy Policy. Specifically, in order to use the App Store, all users were notified of the revised App Store Terms and Conditions (including the Apple Customer Privacy Policy) and required to scroll through the agreement and click an onscreen button that was prominently labeled “Agree,” before using the App Store.

16. Attached as Exhibit J is a true and correct copy of the Apple Customer Privacy Policy released on June 21, 2010, which all App Store users were required to expressly agree to before continuing to use the App Store.

17. Attached as Exhibit K is a true and correct copy of the current Apple Customer Privacy Policy, which was last updated on May 21, 2012.

18. As reflected in Exhibits D – K, each version of the Privacy Policy that was in effect between July 9, 2008 and the release of iOS 6.0 on September 18, 2012 contains the following clause (or a clause that is substantially similar) in the “Third-Party Sites and Services” section:

Apple websites, products, applications, and services may contain links to third-party websites, products, and services. Our products and services may also use or offer products or services from third parties – for example, a third-party iPhone app. Information collected by third parties, which may include such things as location data or contact details, is governed by their privacy practices. We encourage you to learn about the privacy practices of those third parties.

19. As reflected in Exhibits J – K, each version of the Apple Customer Privacy Policy in effect between June 21, 2010 and the release of iOS 6.0 on September 18, 2012 contains the following introductory clause:

Your privacy is important to Apple. So we’ve developed a Privacy Policy that covers how we collect, use, disclose, transfer, and store your information. Please take a moment to familiarize yourself with our privacy practices and let us know if you have any questions.

(Emphases added.)

20. As reflected in Exhibits J – K, each version of the Apple Customer Privacy Policy in effect between June 21, 2010 and the release of iOS 6.0 on September 18, 2012 contains the following clause in the “Protection of Personal Information” section:

Apple takes precautions — including administrative, technical, and physical measures — to safeguard your personal information against loss, theft, and misuse, as well as against unauthorized access, disclosure, alteration, and destruction. Apple online services such as the Apple Online Store and iTunes Store use Secure Sockets Layer (SSL) encryption on all web pages where personal information is collected. To make purchases from these services, you must use an SSL-enabled browser such as Safari, Firefox, or Internet Explorer. Doing so protects the confidentiality of your personal information while it’s transmitted over the Internet. When you use some Apple products, services, or applications or post on an Apple forum, chat room, or social networking service, the personal information you share is visible to other users and can be read, collected, or used by them. You are responsible for the personal information you choose to submit in these instances. For example, if you list your name and email address in a forum posting, that information is public. Please take care when using these features.

21. As reflected in Exhibits J – K, each version of the Apple Customer Privacy Policy in effect between June 21, 2010 and the release of iOS 6.0 on September 18, 2012 contains the following clauses in the “Collection and Use of Personal Information” section:

Personal information is data that can be used to uniquely identify or contact a single person. You may be asked to provide your personal information anytime you are in contact with Apple or an Apple affiliated company. Apple and its affiliates may share this personal information with each other and use it consistent with this Privacy Policy. They may also combine it with other information to provide and improve our products, services, content, and advertising. When you create an Apple ID, register your products, apply for commercial credit, purchase a product, download a software update, register for a class at an Apple Retail Store, or participate in an online survey, we may collect a variety of information, including your name, mailing address, phone number, email address, contact preferences, and credit card information.

Here are some examples of the types of personal information Apple may collect and how we may use it. When you create an Apple ID, register your products, apply for commercial credit, purchase a product, download a software update, register for a class at an Apple Retail Store, or participate in an online survey, we may collect a variety of information, including your name, mailing address, phone number, email address, contact preferences, and credit card information. When you share your content with family and friends using Apple products, send gift certificates and products, or invite others to join you on Apple forums, Apple may collect the information you provide about those people such as name, mailing address, email address, and phone number. In the U.S., we may ask for your Social Security number (SSN) but only in limited circumstances such as when setting up a wireless account and activating your iPhone or when determining whether to extend commercial credit.

22. As reflected in Exhibits J – K, each version of the Apple Customer Privacy Policy in effect between June 21, 2010 and the release of iOS 6.0 on September 18, 2012 contains the following clause in the “Collection and Use of Non-Personal Information” section:

We also collect non-personal information – data in a form that does not permit direct association with any specific individual. We may collect, use, transfer, and disclose non-personal information for any purpose. The following are some examples of non-personal information that we collect and how we may use it: We may collect information such as occupation, language, zip code, area code, unique device identifier, location, and the time zone where an Apple product is used so that we can better understand customer behavior and improve our products, services, and advertising.

(Emphasis added.)

Phone Records

23. Attached as Exhibit L is a true and correct copy of an Apple business record reflecting information about an iPhone 4 with serial number [REDACTED] 6A4S. This document establishes that the iPhone with this serial number shipped with iOS 4.2.1 and was activated on December 26, 2010.

24. Attached as Exhibit M is a true and correct copy of an Apple business record

1 reflecting information about an iPhone 4 with serial number [REDACTED]JA4S. This document
2 establishes that the iPhone with this serial number was running iOS 4.2.1 when it was activated on
3 January 17, 2011. This record also establishes that this iPhone was a warranty replacement iPhone
4 for an individual who previously owned the iPhone with serial number [REDACTED]6A4S.

5 25. Attached as Exhibit N is a true and correct copy of an Apple business record reflecting
6 information about an iPhone 4 with serial number [REDACTED]MA4S. This document establishes that
7 the iPhone with this serial number shipped with iOS version 4.2.1 and was activated on or around
8 February 21, 2011. It also establishes that this iPhone was upgraded to iOS version 4.3.3 on June 11,
9 2011. This record also establishes that this iPhone was a warranty replacement iPhone for an
10 individual who previously owned iPhones with the serial numbers [REDACTED]6A4S and
11 [REDACTED]JA4S.

12 I declare under penalty of perjury under the laws of the United States of America that the
13 foregoing is true and correct and that this declaration was executed on May 17, 2013 in Cupertino,
14 California.

15
16 
17 Mark Buckley